

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DWIGHT D. ALLEN)	
Claimant)	
VS.)	
)	Docket No. 1,015,119
FOOTLOCKER)	
Respondent)	
AND)	
)	
AMERICAN CASUALTY CO. OF READING, PA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the May 9, 2005, Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on October 18, 2005.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Michael P. Bandre of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges he injured his low back in a July 7, 2003, accident while working for respondent. In the May 9, 2005, Award, Judge Benedict found claimant sustained permanent impairment to his low back as a result of the July 7, 2003, work-related accident. In addressing the issue of work disability,¹ Judge Benedict found the evidence did not show a lack of good faith in connection with the termination of claimant's

¹ A permanent partial general disability greater than the functional impairment rating.

employment with respondent. But the Judge found the evidence did show that claimant did not demonstrate good faith in maintaining post-injury employment at Irwin Army Hospital. Therefore, for the wage loss prong of the permanent partial general disability formula in K.S.A. 44-510e, the Judge imputed the wage claimant was earning while working at Irwin Army Hospital. Consequently, the Judge determined claimant's wage loss was 20.2 percent. Further, the Judge determined claimant's task loss was 47.6 percent. Averaging the wage loss and the task loss percentages, Judge Benedict awarded claimant permanent disability benefits for a 33.9 percent work disability.

Respondent and its insurance carrier contend Judge Benedict erred. They argue that the opinions of Dr. Chris E. Wilson, the independent medical examiner, that claimant did not sustain permanent impairment to his low back and did not need work restrictions as a result of the July 7, 2003, accident are more persuasive than the opinions of claimant's medical expert, Dr. Sergio Delgado. Likewise, they argue claimant is not entitled to a work disability. However, should the Board determine claimant is entitled to receive benefits for a work disability, respondent and its insurance carrier request that the wages claimant was earning while working at Irwin Army Hospital be imputed to claimant in calculating claimant's wage loss. Respondent and its insurance carrier request the Board to deny claimant's request for permanent disability benefits or, in the alternative, affirm the Judge's conclusion that claimant's wage loss should be calculated by imputing the wages he was earning while working at Irwin Army Hospital.

Claimant contends the Judge appropriately determined he sustained permanent impairment to his low back in the July 7, 2003, accident. However, claimant requests the Board to modify the May 9, 2005, Award. First, claimant contends the Award contains a mathematical error in the calculation of claimant's task loss.² Second, claimant argues he did not exhibit bad faith in his employment at Irwin Army Hospital and, therefore, his actual current post-injury earnings should be used in determining his wage loss. Accordingly, claimant requests the Board to modify the May 9, 2005, Award to grant claimant benefits for a 39.8 percent work disability, which is based upon a 52.4 percent task loss and a 27.2 percent wage loss.

The issues before the Board on this appeal are:

1. Did claimant's July 7, 2003, accident either permanently aggravate or permanently injure claimant's low back?
2. If so, what is the nature and extent of claimant's injury and disability?

² Claimant contends the task loss result should be 52.4 percent rather than 47.6 percent.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds, as follows:

1. Respondent employed claimant as a material handler. That job required claimant to stock shelves and lift 15- to 75-pound boxes of apparel, footwear, and sporting goods. The parties stipulated that on July 7, 2003, claimant injured his low back while working for respondent. Despite receiving conservative medical treatment, claimant contends he is now unable to sit, stand, or walk for any prolonged period.
2. But this is not the first time that claimant experienced pain in his low back and down into his legs. In late February 2002, claimant sought medical treatment for low back symptoms. At that time, claimant saw a doctor at Irwin Army Hospital on one occasion and, according to claimant, his low back pain resolved. Claimant testified he is a computer specialist in the Army Reserves and that his low back did not bother him or prevent him from doing any of his physical conditioning before the July 2003 injury.
3. On August 21, 2003, before claimant completed his medical treatment for his July 2003 injury, respondent terminated him for missing work. According to claimant's uncontradicted testimony, he was terminated because he missed work due to his low back injury and because he had "a late problem."³
4. A few months after being fired by respondent, claimant obtained a job as a certified nursing assistant in an Alma, Kansas, nursing home but quit after one week because he could not perform the job. A few months after quitting that job, in January 2004 claimant obtained employment as a medical administrative assistant at Irwin Army Hospital through an employment agency. Claimant was terminated from that job in September 2004 for making a threatening remark. That job paid \$10.24 per hour or \$409.60 per week. And on December 20, 2004, claimant began working for Kansas State University as an administrative assistant, earning \$9.34 per hour or \$373.60 per week.
5. At his attorney's request, claimant saw orthopedic surgeon Dr. Sergio Delgado to be evaluated for purposes of this claim. The doctor examined claimant in late July 2004 and concluded claimant had a chronic lumbosacral strain and nonverifiable

³ R.H. Trans. at 16.

sciatic radiculopathy. Using the *AMA Guides*⁴ (4th ed.), the doctor rated claimant as having a five percent whole person functional impairment due to the July 2003 accident. Moreover, Dr. Delgado recommended that claimant avoid repetitive bending, stooping, and twisting; avoid repetitively lifting more than 25 pounds from the floor or 35 pounds from his waist to overhead; limit occasional lifts to 50 pounds from the floor and 65 or 75 pounds from the waist to overhead; and alternate sitting and standing as needed.

6. Claimant hired vocational expert Monty Longacre to meet with claimant and create a list of work tasks claimant performed in the 15-year period before the July 2003 low back injury. Dr. Delgado reviewed Mr. Longacre's task list and determined claimant should not perform 22 of the 42 tasks, or 52 percent. The doctor also concluded claimant's preexisting low back condition would not have warranted a rating under the *AMA Guides* as the symptoms he experienced in 2002 resolved within a few days.
7. The parties agreed the July 1, 2004, medical report of Dr. Chris E. Wilson was part of the record. Dr. Wilson examined claimant and issued a report dated July 1, 2004, after the Judge requested medical treatment recommendations. Contrary to Dr. Delgado's examination, Dr. Wilson found no obvious spasm or guarding in claimant's low back. Also contrary to Dr. Delgado, Dr. Wilson determined claimant's July 2003 accident resulted in a lumbar strain and merely temporarily aggravated "a pre-existing pattern of low back pain and left sided lower extremity pain." Nevertheless, Dr. Wilson recommended two epidural injections. The doctor also concluded claimant's current low back problems were primarily due to preexisting degenerative disc disease in his low back. Moreover, Dr. Wilson concluded claimant sustained no additional permanent impairment due to the July 2003 injury and that he would not place any work restrictions upon claimant due to that event.

CONCLUSIONS OF LAW

The May 9, 2005, Award should be modified to correct the task loss percentage. But the Judge's findings that claimant has sustained a five percent whole person functional impairment rating and that the wages claimant earned while working at Irwin Army Hospital should be imputed to claimant for purposes of determining his wage loss should be affirmed.

Similar to the Judge, the Board is persuaded by Dr. Delgado's opinion that claimant has sustained a five percent whole person functional impairment due to his work-related

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

back injury. Before the July 2003 injury, the record indicates claimant had only one instance of low back complaints, which occurred in February 2002. After seeing a doctor in 2002, claimant's low back symptoms resolved. In short, immediately before the July 2003 injury claimant had no symptoms in his low back, but following that injury his low back symptoms have continued. Accordingly, the Board discounts Dr. Wilson's opinion that claimant's work-related injury was only temporary in nature.

Because a back injury is not listed in the schedule of K.S.A. 44-510d, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁵ and *Copeland*.⁶ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁷

The Kansas Court of Appeals in *Watson*⁸ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁹

The Board affirms the Judge's finding that the post-injury wages claimant was earning while working at Irwin Army Hospital should be imputed for purposes of determining his wage loss. The statement claimant made to a co-worker intimating that claimant wanted a weapon to use against other co-workers was very inappropriate and tantamount to failing to put forth a good faith effort to retain his employment. Accordingly, the Board imputes the wages claimant was earning at Irwin Army Hospital, which were \$409.60 per week. Comparing \$409.60 per week to the stipulated average weekly wage of \$513.33 per week yields a wage loss of 20 percent.

As indicated above, Dr. Delgado testified claimant has lost the ability to perform approximately 52 percent of his former work tasks. The Board finds that opinion persuasive and adopts it as its finding.

Averaging claimant's 20 percent wage loss with his 52 percent task loss creates a 36 percent permanent partial general disability. Accordingly, the May 9, 2005, Award should be modified to increase claimant's permanent partial general disability from 33.9 percent to 36 percent.

⁷ *Id.* at 320.

⁸ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁹ *Id.* at Syl. ¶ 4.

AWARD

WHEREFORE, the Board modifies the May 9, 2005, Award entered by Judge Benedict.

Dwight D. Allen is granted compensation from Footlocker and its insurance carrier for a July 7, 2003, accident and resulting disability. Based upon an average weekly wage of \$513.33, Mr. Allen is entitled to receive 149.40 weeks of permanent partial general disability benefits at \$342.24 per week, or \$51,130.66, for a 36 percent permanent partial general disability and a total award of \$51,130.66.

As of October 20, 2005, Mr. Allen is entitled to receive 119.43 weeks of permanent partial general disability compensation at \$342.24 per week, or \$40,873.72, for a total due and owing of \$40,873.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$10,256.94 shall be paid at \$342.24 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director